The Supreme Court Wreaks Havoc in the Lower Federal Courts--Again

By MICHAEL C. DORF

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Here's a pop quiz. Can you name the most important Supreme Court decision of the last Term? Was it *Gonzales v. Carhart*, the ruling upholding the federal Partial Birth Abortion Act? Or how about *Parents Involved in Community Schools v. Seattle School District No. 1*, which invalidated the voluntary use of race by public school boards in Kentucky and Washington?

Not even close, at least by one important measure: How many times has the ruling been cited by the lower federal courts? According to my WestLaw research at the end of last week, the partial-birth abortion case had been cited eleven times since it was decided in April, and the schools case had been cited just twice since it was decided in late June.

In contrast, the hands-down winner for most-cited was *Bell Atlantic Corp. v. Twombly*. Since the case was decided in late May, it has been cited by the lower federal courts a whopping 457 times. Indeed, it has been cited almost 300 times in July and August alone.

If you've never heard of the *Twombly* ruling, that's probably because you don't litigate in the federal courts. And therein lies the rub: The *Twombly* case, as I explain in this column, concerns the standard to be used by federal district judges in deciding whether to dismiss a lawsuit before allowing the plaintiff to conduct civil discovery (interrogatories, depositions, document requests and the like). It is fundamentally about what we might call "lawyer's law." However, the case was produced by a Supreme Court whose Justices have had very little trial court experience.. Unfortunately, here and elsewhere, that lack of experience sometimes shows.

A Very Brief History of Pleading Practice Before *Twombly*

Under the old common law of England and America, court procedure developed into a highly arcane body of rules. In order to have a case heard by a jury, a plaintiff and his lawyer first had to navigate a minefield of procedural traps.

For example, suppose that Mr. P believed that Mr. D had acted negligently in driving his horse-drawn carriage over P's foot. P would bring a lawsuit alleging "trespass on the case," the predecessor to the modern claim for negligence. However, if it turned out that D had actually driven over P's foot deliberately, D could successfully move to have the case dismissed on the ground that P should have sued him for simple "trespass," the predecessor to the modern tort of intentional battery.

By the middle of the Nineteenth Century, this and other absurdities of pleading practice began to inspire reforms that culminated in the adoption of the Federal Rules of Civil Procedure in 1938. These rules, which operate in federal court and have been widely copied by state courts, have at their core a preference for adjudication on the merits, rather than making litigation simply a match of lawyers' wits. (In **a recent column**, I explained why the newly revised Federal Rules should be interpreted in accordance with this preference when disputes arise.)

The central feature of the Federal Rules is "notice pleading," the idea that to initiate a lawsuit, the plaintiff need only provide the defendant with "notice" of what the case is about. Details about what

exactly the plaintiff thinks happened come at a later stage of the proceedings, after there has been an opportunity to conduct discovery.

Balancing Risks to Plaintiffs and Defendants

Notice pleading, however, is itself costly. The old system of procedure screened out some potentially meritorious lawsuits because the plaintiff could not allege exactly what happened to him without first having access through discovery to the defendant's records and testimony. Yet the new system of notice pleading has the opposite vice: It subjects some defendants who have done nothing wrong to costly discovery, and those costs are not recouped even if the defendant ultimately prevails on the merits.

The federal system has responded to the risk of costly discovery in three principal ways: First, various rules impose ethical obligations on lawyers to conduct some investigation to ensure the legitimacy of the lawsuit before filing. However, the rules only require "an inquiry reasonable under the circumstances," and because those circumstances do not yet include formal discovery, many lawsuits that appear reasonable when filed can ultimately prove to be without merit.

Second, in areas where Congress has concluded that the risks and/or costs of discovery are especially high, it has occasionally demanded that a plaintiff and her lawyer satisfy a "heightened pleading standard." In cases in which such a standard applies, the complaint must allege specific facts that show the defendant's liability, and the background ethical rules require that the plaintiff and her lawyer have evidence of such specific facts even before they are entitled to formal discovery. For example, thePrivate Securities Litigation Reform Act (PSLRA), enacted in 1995, contains a heightened pleading standard for securities fraud cases.

Third, the Federal Rules themselves provide for a heightened pleading standard in two circumstances: Under Rule 9(b), if a plaintiff's claim to relief (or a defendant's defense) depends on an allegation of fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity."

Exactly why Rule 9(b) singles out these two sorts of allegations for a heightened pleading standard is something of a mystery. However, the Supreme Court made clear in two unanimous rulings that federal judges could not impose a heightened pleading standard in circumstances not covered by either Rule 9(b) or an Act of Congress such as the PSLRA. In the 1993 decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* and the 2002 decision in *Swierkiewicz v. Sorema N.A.*, the Justices said that only a change in the text of the Federal Rules or an Act of Congress could impose a heightened pleading standard in cases not covered by the current version of Rule 9(b) or an existing statute.

The *Twombly* Decision

There matters stood, until the Court decided *Twombly* this past May. The plaintiffs sought to bring a class action on behalf of telephone customers against local telephone companies, alleging that the latter had conspired to divide up the national market into a system of local monopolies, in violation of federal antitrust law. The Supreme Court ruled that the complaint should be dismissed because it did not include "enough factual matter (taken as true) to suggest that an agreement was made" among the various local telephone companies. "Proceeding to antitrust discovery can be expensive," the Court explained, and so district judges must take "care to require allegations that reach the level suggesting conspiracy" before permitting a case to go forward.

The foregoing language sounds very much like a heightened pleading requirement for cases alleging conspiracy, or at least for cases alleging an antitrust conspiracy. Whereas a simple allegation of "negligence" is enough to get to discovery in a medical malpractice case or a fender-bender (assuming the case involves enough money to satisfy the jurisdictional minimum for federal court), "conspiracy" requires "factual matter." Accordingly, Justices John Paul Stevens and Ruth Bader Ginsburg dissented, invoking the longstanding principles of notice pleading.

Yet Justice Souter's majority opinion in *Twombly* vociferously denied that the Court was imposing a heightened pleading requirement, and reaffirmed the principle announced in the *Leatherman* and *Swierkiewicz* cases: Notice pleading is sufficient, absent a specific Act of Congress or an amendment to Rule 9(b).

If the *Twombly* decision did not rest on a heightened pleading standard for conspiracy or antitrust conspiracy cases, the most logical inference is that it raised the bar, requiring more factual detail, for all categories of cases. But that interpretation, too, is problematic because in a brief unsigned June opinion in *Erickson v. Pardus*, the Court unanimously cited *Twombly* itself as authority for rejecting any requirement of factual detail in a lawsuit by a prisoner alleging cruel and unusual punishment.

Thus the question remains: How should *Twombly* be understood? That question has perplexed the hundreds of federal judges who have already had to confront dismissal motions citing *Twombly*.

Chaos in the Lower Federal Courts

The hundreds of lower court opinions citing *Twombly* take a variety of positions on the meaning of the case. The lower court judges all agree, however, that *Twombly* does not impose a heightened pleading standard--because the Supreme Court said it was not imposing such a heightened standard.

Some lower court opinions point to *Erickson* in support of the proposition that *Twombly* also did not change the basic rules of notice pleading. Other courts, however, have understood *Twombly* as requiring that henceforth all complaints in all cases must satisfy a plausibility standard. Highly implausible allegations demand additional detail in pleading, on this view. Still other courts have puzzled over whether *Twombly* can be confined to the antitrust context, or at least to conspiracy cases.

It is not clear which, if any, of these approaches is most faithful to *Twombly*. What is clear is that the Supreme Court will soon have to revisit the question of pleading standards to resolve the ambiguity that *Twombly* created. If the Court's recent performance is any guide, its efforts at clarification may not be fully successful.

Not-So-Lovely *Rita*

Consider the Court's line of decisions holding that the Sixth Amendment right to jury trial requires that factual issues that serve as the basis for a sentencing determination must be proved to a jury beyond a reasonable doubt. In the 2005 decision in *United States v. Booker*, the Court relied on this principle to invalidate the federal Sentencing Guidelines. However, because no five Justices could agree on both the underlying flaw and the appropriate remedy, the result was essentially a compromise: Judges could still make factual determinations to calculate a sentence within the Guidelines, but the Guidelines would only be advisory, rather than mandatory.

Since *Booker*, the lower federal courts have struggled to implement the decision, and this past Term, the Court held in *Rita v. United States* that a federal appeals court could treat a sentence within the Guidelines range as presumptively reasonable. The good news was that this time, the Court was nearly

unanimous, with Justices who had dissented from the remedial holding in *Booker* now accepting it as settled law. The bad news was that the resulting set of rules was a mess: Appeals courts reviewing district court decisions for reasonableness can (but don't have to) afford a presumption of reasonableness to a sentence within the Guidelines range, which district court judges in turn can (but don't have to) follow.

That's a lot of discretion for lower court judges, which might be a good thing when it comes to sentencing but it's hardly a very good way to try to preserve the underlying principles of the Sentencing Guidelines, which value uniformity.

An Academic Supreme Court?

Whatever one thinks of the ideology of the individual Justices of the current Supreme Court, on the whole and by historical standards, they are a highly-qualified group. All were federal appeals court judges before coming to the high Court--although only very briefly in the cases of Justices Souter, Thomas, and Roberts. Some were distinguished law professors and/or practitioners as well. And some had substantial government experience.

Along one important dimension, however, the Justices' resumes are thin: trial experience. Most of the Justices have no real experience as trial lawyers, and only one was a trial court judge. Yet much of their work in supervising the lower federal courts involves judgments about how trials can be most effectively and fairly run. As cases like *Twombly*, *Booker* and *Rita* illustrate, their lack of experience sometimes shows.

To be sure, one need not have been a trial lawyer or a trial court judge to reach a correct judgment about matters affecting trials. Justice Ginsburg, for example, taught civil procedure for many years before becoming a judge, and so made a study of the practicalities of litigation. (She also litigated.) Significantly, however, she was one of the two dissenters in *Twombly*. The other dissenter, Justice Stevens, practiced and taught antitrust law in his pre-judicial career. Justice Souter, who wrote the majority opinion in *Twombly*, was a trial court judge in New Hampshire, but in state rather than federal court. Thus, the two Justices who were arguably most knowledgeable about the *Twombly* subject matter were in dissent. One would have hoped that their colleagues would have paid a bit more attention to the experts in their midst.

Without a significant base of their own experience on which to draw or a willingness to listen carefully to their more knowledgeable colleagues, most of the current Supreme Court Justices will likely continue to stumble in matters of federal trial court procedure. That may be a boon to the lawyers who get to argue for years over the meaning of the Court's Delphic rulings, but it's a bane for their clients and for the law.

Michael C. Dorf is the Isidor & Seville Sulzbacher Professor of Law at Columbia University. He is the author of *No Litmus Test: Law and Politics in the Twenty-First Century* and he blogs at www.michaeldorf.org.